Edisijuta Parking Sdn Bhd v TH Universal Builders Sdn Bhd & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01(IM)(NCVC)-146–04 OF 2025
WONG KIAN KHEONG JCA
18 JUNE 2025

Civil Procedure — Injunction — Erinford injunction — Ex parte Erinford injunction — High Court struck out appellant's action, dismissed appellant's interlocutory injunction application, and set aside ex parte interlocutory injunction — High Court dismissed appellant's application for Erinford injunction — Appellant filed notice of motion in Court of Appeal for ex parte Erinford injunction — President of the Court of Appeal directed judge to sit alone pursuant to s 44(1) of Courts of Judicature Act 1964 — Whether ex parte application should be heard inter partes pursuant to r 50 of the Rules of the Court of Appeal 1994 — Whether Court of Appeal's judge sitting alone should grant conditional interim Erinford injunction — Courts of Judicature Act 1964 ss 38(1), 44(1) & (3) — Rules of the Court of Appeal 1994 r 50

Via an agreement ('the agreement') between the parties, the appellant was granted a license to operate car park services in a building ('the building') owned by the respondents. Towards the end of the term of the agreement, the appellant had submitted a revised proposal to the first respondent for an extension of the agreement for an additional period of three years. The appellant contended that the second respondent had accepted the revised proposal, hence, there was a valid extension of the agreement. Despite the existence of the alleged extension agreement, the second respondent had notified the appellant regarding the expiry of the agreement and further asked the appellant to hand over the car park services to the new operator known as NES Solutions Sdn Bhd ('NESS'). The appellant then brought an action against the respondents in the High Court ('the suit') for the following reliefs: (a) a declaration that the agreement had been extended; (b) a declaration that any contract awarded by the respondents to a third party regarding the car park services was null and void; (c) an injunction to compel the respondents to take all necessary action to ensure that the appellant was the exclusive operator of the car park services; (d) an injunction to restrain the respondents from performing any of the terms and conditions of any contract with any third party in relation to the car park services; (e) general damages or loss of profits suffered by the appellant; and (f) exemplary damages. Initially, the High Court allowed the appellant's application for ex parte interlocutory injunction but at the end of the trial, the court dismissed the appellant's interlocutory injunction application, set aside the ex parte interlocutory injunction, and struck out the

suit. Pending an appeal to the Court of Appeal ('the main appeal'), the appellant applied for Erinford injunction to restrain the respondents from: (i) performing any of the terms and conditions of any contract entered into with any third party, including but not limited to NESS, in relation to the car park services; and (ii) evicting the appellant from the building. The High Court dismissed the said application and ordered the appellant to leave the building on 29 April 2025 ('the High Court's eviction order'). The appellant then filed the present application by way of notice of motion before the Court of Appeal for an ex parte Erinford injunction ('encl 7'). The learned President of the Court of Appeal ('PCA') had directed the judge in the present case to sit alone pursuant to s 44(1) of the Courts of Judicature Act 1964 ('the CJA') and to hear the said ex parte notice of motion.

Held:

(1) In an ex parte application, the Court of Appeal ('the COA') had a discretion to adopt any one of the following options: (a) the COA may proceed to hear the ex parte application ('the first option'); (b) the COA may direct the ex parte application to be heard as an 'opposed ex parte application' ('the second option'); and (c) by virtue of r 50 of the Rules of the Court of Appeal 1994 ('the RCA'), the COA may direct the ex parte application to be heard as an inter partes application ('the third option') (see para 28).

(2) The court in the present case was in favour of the third option. The court opined that: (a) an ex parte application should only be filed in the COA 'where it was genuinely impossible to give notice without defeating the purpose of the order' to be sought from the COA; (b) the third option should be the rule and not the exception; (c) if the COA exercised the third option, the ex parte application needed not be heard, hence, there was an optimal use of the limited resources of the COA and the parties too could minimise their time, effort and costs; and (d) the COA's exercise of the third option may also prevent an abuse of the ex parte application, especially when an ex parte interlocutory mandatory injunction was sought for. Further, after the High Court's dismissal of the interlocutory injunction application and the Erinford injunction application, the party who was the subject matter of the said injunction application ('Y') was entitled to conduct Y's business and/or affairs. If an ex parte Erinford injunction application was made and subsequently granted by the COA, Y may not only be surprised but may also be prejudiced because Y's business/affairs may be adversely affected by the said ex parte Erinford injunction (see paras 29 & 31).

(3) The learned PCA may direct a notice of motion to be heard by: (a) a single judge under s 44(1) of the CJA ('single judge panel'); or (b) a three-member panel pursuant to s 38(1) of the CJA ('three-judge panel').

There was a distinction between the powers and orders which could be made by a single judge panel and three-judge panel. By virtue of s 44(1) of the CJA, a single judge panel may grant an Erinford injunction pending the disposal of an appeal as an 'interim order to prevent prejudice to the claims of parties pending the hearing of the proceeding' ('interim Erinford injunction (single judge panel)'). Any party who was 'aggrieved' by the interim Erinford injunction (single judge panel), may apply to a three-judge panel under s 44(3) of the CJA for the said injunction to be 'affirmed, varied or discharged' (see paras 34–36).

(4) The judge in the present case had exercised his discretion pursuant to s 44(1) of the CJA to grant an interim Erinford injunction (single judge panel) against the second respondent only based on the following two conditions: (a) the appellant shall furnish an undertaking to pay damages to the second respondent if the interim Erinford injunction (single judge panel) was subsequently set aside by a three-judge panel under s 44(3) of the CJA or if the main appeal was subsequently dismissed by a three-judge panel; and (b) the said undertaking by the appellant shall be fortified by the appellant's deposit of RM200,000 ('the conditional interim Erinford injunction (single judge panel)') (see para 39).

(5) The reasons for the grant of the conditional interim Erinford injunction (single judge panel) were as followed: (a) in view of the imminent effect of the High Court's eviction order on the very next day, there was simply no time for the respondents to file any affidavit or written submission to oppose encl 7; (b) the conditional interim Erinford injunction (single judge panel) may be set aside, wholly or in part, by a three-judge panel pursuant to s 44(3) of the CJA, therefore, there was an expeditious remedy available to the second respondent; and (c) if the second respondent suffered any loss and/or damages due to the conditional interim Erinford injunction (single judge panel), the second respondent may enforce the appellant's undertaking and apply to the COA for an order of assessment of the second respondent's loss and/or damages to be conducted by the High Court (see para 40).

[Bahasa Malaysia summary

Melalui suatu perjanjian ('perjanjian tersebut') antara pihak-pihak, perayu telah diberikan lesen untuk mengendalikan perkhidmatan tempat letak kereta di bangunan ('bangunan tersebut') yang dimiliki oleh responden-responden. Menjelang akhir tempoh perjanjian tersebut, perayu telah mengemukakan cadangan yang disemak semula kepada responden pertama untuk lanjutan perjanjian tersebut untuk tempoh tambahan tiga tahun. Perayu berhujah bahawa responden kedua telah menerima cadangan yang disemak semula tersebut, justeru, terdapat lanjutan perjanjian yang sah. Walaupun wujud perjanjian lanjutan yang didakwa tersebut, responden kedua telah memaklumkan kepada perayu tentang tempoh perjanjian tersebut yang

hampir tamat dan seterusnya meminta perayu menyerahkan perkhidmatan tempat letak kereta tersebut kepada pengendali baharu yang dikenali sebagai NES Solutions Sdn Bhd ('NESS'). Perayu kemudiannya membawa tindakan terhadap responden-responden di Mahkamah Tinggi ('saman tersebut') untuk relief-relief berikut: (a) pengisytiharan bahawa perjanjian tersebut telah dilanjutkan; (b) pengisytiharan bahawa apa-apa kontrak yang diberikan oleh responden-responden kepada pihak ketiga mengenai perkhidmatan tempat letak kereta tersebut adalah terbatal dan tidak sah; (c) suatu injunksi untuk memaksa responden-responden mengambil semua tindakan yang perlu untuk memastikan bahawa perayu adalah pengendali eksklusif perkhidmatan tempat letak kereta tersebut; (d) suatu injunksi untuk menghalang responden-responden daripada melaksanakan apa-apa terma dan syarat mana-mana kontrak dengan mana-mana pihak ketiga berhubung dengan perkhidmatan tempat letak kereta tersebut; (e) ganti rugi am atau kehilangan keuntungan yang dialami oleh perayu; dan (f) ganti rugi teladan. Pada mulanya, Mahkamah Tinggi membenarkan permohonan perayu untuk injunksi interlokutori ex parte tetapi pada akhir perbicaraan, mahkamah menolak permohonan injunksi interlokutori perayu, mengenepikan injunksi interlokutori ex parte tersebut, dan membatalkan saman tersebut. Sementara menunggu rayuan kepada Mahkamah Rayuan ('rayuan utama'), perayu memohon injunksi Erinford untuk menghalang responden-responden daripada: (i) melaksanakan mana-mana terma dan syarat mana-mana kontrak yang dimeterai dengan mana-mana pihak ketiga, termasuk tetapi tidak terhad kepada NESS, berhubung dengan perkhidmatan tempat letak kereta tersebut; dan (ii) mengusir perayu dari bangunan tersebut. Mahkamah Tinggi menolak permohonan tersebut dan memerintahkan perayu meninggalkan bangunan tersebut pada 29 April 2025 ('perintah pengusiran Mahkamah Tinggi'). Perayu kemudiannya memfailkan permohonan semasa melalui notis usul di hadapan Mahkamah Rayuan untuk injunksi Erinford ex parte ('lampiran 7'). Presiden Mahkamah Rayuan ('PMR') yang bijaksana telah mengarahkan hakim dalam kes semasa untuk bersidang sendirian menurut s 44(1) Akta Mahkamah Kehakiman 1964 ('AMK') dan mendengar notis usul ex parte tersebut.

Diputuskan:

(1) Dalam permohonan ex parte, Mahkamah Rayuan ('MR') mempunyai budi bicara untuk menerima pakai mana-mana satu daripada pilihan-pilihan berikut: (a) MR boleh meneruskan untuk mendengar permohonan ex parte tersebut ('pilihan pertama'); (b) MR boleh mengarahkan permohonan ex parte didengar sebagai 'opposed ex parte application' ('pilihan kedua'); dan (c) menurut k 50 Kaedah-Kaedah Mahkamah Rayuan 1994 ('KKMR'), MR boleh mengarahkan permohonan ex parte tersebut didengar sebagai permohonan inter partes ('pilihan ketiga') (lihat perenggan 28).

(2) Mahkamah dalam kes semasa lebih cenderung kepada pilihan ketiga.

Mahkamah berpendapat bahawa: (a) permohonan ex parte hanya perlu difailkan dalam MR 'where it was genuinely impossible to give notice without defeating the purpose of the order' yang ingin dipohon daripada MR; (b) pilihan ketiga hendaklah menjadi peraturan dan bukan pengecualian; (c) jika MR melaksanakan pilihan ketiga, permohonan ex parte tidak perlu didengar, oleh itu, terdapat penggunaan optimum sumber MR yang terhad dan pihak-pihak juga boleh meminimumkan masa, usaha dan kos mereka; dan (d) pelaksanaan pilihan ketiga oleh MR juga boleh menghalang penyalahgunaan permohonan ex parte, terutamanya apabila injunksi mandatori interlokutori ex parte dipohon. Selain itu, selepas Mahkamah Tinggi menolak permohonan injunksi interlokutori dan permohonan injunksi Erinford, pihak yang menjadi subjek permohonan injunksi tersebut ('Y') berhak untuk menjalankan perniagaan dan/atau hal-ehwal Y. Jika permohonan injunksi Erinford ex parte dibuat dan kemudiannya dibenarkan oleh MR, Y mungkin bukan sahaja terkejut tetapi mungkin juga diprejudiskan kerana perniagaan/hal-ehwal Y mungkin terjejas teruk oleh injunksi Erinford ex parte tersebut (lihat perenggan 29 & 31).

(3) Presiden Mahkamah Rayuan yang bijaksana boleh mengarahkan notis usul didengar oleh: (a) seorang hakim tunggal di bawah s 44(1) AMK ('panel hakim tunggal'); atau (b) panel tiga ahli menurut s 38(1) AMK ('panel tiga hakim'). Terdapat perbezaan antara kuasa dan perintah yang boleh dibuat oleh panel hakim tunggal dan panel tiga hakim. Berdasarkan s 44(1) AMK, panel hakim tunggal boleh memberikan injunksi Erinford sementara menunggu pelupusan rayuan sebagai 'perintah interim bagi mengelakkan kemudaratan pada tuntutan pihak sementara menunggu pendengaran prosiding itu' ('injunksi interim Erinford (panel hakim tunggal)'). Mana-mana pihak yang 'terkilan' dengan injunksi interim Erinford (panel hakim tunggal) tersebut, boleh memohon kepada panel tiga hakim di bawah s 44(3) AMK untuk injunksi tersebut 'disahkan, diubah atau dilepaskan' (lihat perenggan 34–36).

(4) Hakim dalam kes semasa telah menggunakan budi bicaranya menurut s 44(1) AMK untuk memberikan injunksi interim Erinford (panel hakim tunggal) hanya terhadap responden kedua berdasarkan dua syarat berikut: (a) perayu hendaklah memberikan akujanji untuk membayar ganti rugi kepada responden kedua jika injunksi interim Erinford (panel hakim tunggal) kemudiannya diketepikan oleh panel tiga hakim di bawah s 44(3) AMK atau jika rayuan utama kemudiannya ditolak oleh panel tiga hakim; dan (b) akujanji tersebut oleh perayu hendaklah diperkukuhkan dengan deposit oleh perayu sebanyak RM200,000 ('injunksi interim Erinford bersyarat (panel hakim tunggal)') (lihat perenggan 39).

(5) Sebab-sebab bagi pemberian injunksi interim Erinford bersyarat (panel hakim tunggal) tersebut adalah seperti berikut: (a) memandangkan kesan terdekat perintah pengusiran Mahkamah Tinggi pada hari berikutnya, langsung tidak ada masa untuk responden-responden memfailkan apa-apa afidavit atau penghujahan bertulis untuk menentang lampiran 7; (b) injunksi interim Erinford bersyarat (panel hakim tunggal) tersebut boleh diketepikan, sepenuhnya atau sebahagiannya, oleh panel tiga hakim menurut s 44(3) AMK, oleh itu, terdapat remedi segera yang tersedia untuk responden kedua; dan (c) jika responden kedua mengalami apa-apa kehilangan dan/atau kerugian disebabkan injunksi interim Erinford bersyarat (panel hakim tunggal) tersebut, responden kedua boleh menguatkuasakan akujanji perayu dan memohon kepada MR untuk perintah taksiran kehilangan dan/atau kerugian responden kedua yang akan dijalankan oleh Mahkamah Tinggi (lihat perenggan 40).]

Cases referred to

Aspen Glove Sdn Bhd v Tialoc Malaysia Sdn Bhd [2024] 4 MLJ 825, CA (refd)
Chin Wai Hong & Anor v Lim Guan Hoe & Anor [2014] MLJU 1948; [2014] 5 AMR 427, HC (refd)
Juris Technologies Sdn Bhd & Anor v Foo Tiang Sin & Ors [2019] 12 MLJ 785, HC (refd)
Million Group Credit Sdn Bhd v Lee Shoo Khoon & Ors [1986] 1 MLJ 315, HC (refd)
Mukhriz Mahathir v Datuk Seri Mohd Najib bin Tun Hj Abdul Razak (suggested contemnor) & Anor [2018] 3 MLJ 715, CA (refd)
Pacific Centre Sdn Bhd v United Engineers (M) Bhd [1984] 2 MLJ 143 (refd)
Permodalan MBF Sdn Bhd v Tan Sri Datuk Seri Hamzah bin Abu Samah & Ors [1988] 1 MLJ 178, SC (refd)

Legislation referred to

Courts of Judicature Act 1964 ss 38(1), 43, 44, 44(1), (3), 73
Rules of the Court of Appeal 1994 rr 13, 22, 27(1), (3), 49, 50
Solicitors' Account Rules 1990 r 2

Appeal from: *Edisijuta Parking Sdn Bhd v TH Universal Builders Sdn Bhd & Anor* [2025] MLJU 1733 (High Court, Kuala Lumpur)

Nadesh Ganabaskaran (with Nurul Hibbah bt Abdul Khalid) (Malek Gan & Partners) for the appellant.
Megat Abdul Munir bin Megat Abdullah Rafaie (with Alya Tadwini bt Talhah, Nik Mohamad Syakhir bin Mohd Yasin and Puteri Humaira bt Megat Abdul Munir) (Zain, Megat & Murad) for the first respondent.
Mohd Iskandar bin Ismail (with Nur Syahirah bt Mohd Sani and Muhammad Faris bin Muhamad Fazly) (Basharuddin Iskandar) for the second respondent.

Wong Kian Kheong JCA:

A. INTRODUCTION

[1] I have been directed by the learned President of the Court of Appeal ('PCA') to sit alone pursuant to s 44(1) of the Courts of Judicature Act 1964 ('the CJA') and hear an ex parte notice of motion for an Erinford injunction pending the disposal of an appeal to the Court of Appeal.

B. BACKGROUND

[2] The appellant company ('appellant') entered into a 'carpark operator cum licence agreement' dated 1 October 2019 ('agreement'), with Bukit Damansara Development Sdn Bhd ('BDD'). According to the agreement, among others, BDD granted the appellant a license to operate car park services, including valet services ('car park services'), at VSquare @ PJ City Centre, Jalan Utara, 46200 Petaling Jaya, Selangor ('building'). The agreement was for a period of five years, commencing on 1 October 2019 and concluding on the 30 September 2024 (expiry date).

[3] Around December 2020, the second respondent ('second respondent') entered into a separate arrangement with BDD wherein the second respondent acquired ownership of the building from BDD for a consideration of RM147m.

[4] By a 'notice of assignment' dated 2 November 2021 from BDD to the appellant (copied to the second respondent), BDD informed the appellant that, among others, BDD had assigned, novated and transferred absolutely all of BDD's rights, interest, benefits, liabilities and obligations under the agreement to the second respondent.

[5] The first respondent company ('first respondent') is a subsidiary of TH Properties Sdn Bhd (which is part of the second respondent's group of companies).

[6] The appellant alleged as follows, among others:

(1) on 19 April 2024, the appellant submitted a revised proposal to the first respondent for an extension of the agreement for an additional three-year term commencing from 1 October 2024 until 30 September 2027 (appellant's revised proposal); and

(2) on 26 April 2024, the second respondent had accepted the appellant's revised proposal. Hence, there was a valid extension of the agreement

A from 1 October 2024 until 30 September 2027 ('alleged extension (agreement)').

[7] By a letter dated 28 August 2024 (issued under the cover of an email dated 2 September 2024), the second respondent notified the appellant that the agreement would expire on 30 September 2024 and gave the plaintiff a two months' period (until 31 October 2024) for the smooth handover of the car park services to the new car park operator ('second respondent's notice (28 August 2024)'). The second respondent's notice (28 August 2024) was copied to the first respondent.

[8] According to the appellant:

(1) the appellant had relied on the expectation of the alleged extension (agreement) and had therefore incurred expenditure in a sum of RM690,000; and

(2) due to the second respondent's notice (28 August 2024), the appellant now face a potential loss of profit as the agreement would not be extended.

[9] The appellant had recently discovered that the second respondent intended to award the operation of the car park services to NES Solutions Sdn Bhd ('NESS').

[10] A director and shareholder of NESS is Mr Eugene Berchman Netto ('Mr Eugene'), a former employee of the appellant. With regard to Mr Eugene, the appellant averred as follows:

(1) there were serious concerns regarding Mr Eugene's possession of proprietary and confidential information about the operational and contractual aspects of the agreement;

(2) Mr Eugene had been entrusted by the appellant to manage and handle the appellant's account, including the car park services; and

(3) when NESS was incorporated on 24 February 2020, Mr Eugene was still employed by the appellant.

[11] The appellant's solicitors sent a letter dated 18 October 2024 to the first respondent ('appellant's demand (18 October 2024)') which:

(1) demanded the first respondent to honour the alleged extension (agreement); and

(2) gave the first respondent seven days to respond in writing to the appellant's demand (18 October 2024).

[12] There was no response by the first respondent to the appellant's demand (18 October 2024). A

[13] The appellant's solicitors sent a letter dated 21 October 2024 to NESS and Mr Eugene ('appellant's demand (21 October 2024)'). According to the appellant's demand (21 October 2024): B

(1) NESS and Mr Eugene should immediately cease and desist from dealing with the appellant's customers, including the second respondent and its related companies; and

(2) the appellant further demanded for NESS and Mr Eugene to confirm in writing within 48 hours that they would comply with the above demand. C

[14] By a letter dated 23 October 2024, the solicitors for NESS and Mr Eugene denied the alleged extension (agreement) and averred that NESS had a valid and binding contract with the second respondent. Consequently, NESS and Mr Eugene refused to comply with the appellant's demand to cease and desist from dealing with the second respondent and its related companies. D

C. PROCEEDINGS IN THE HIGH COURT E

[15] The appellant filed a suit in the High Court against the first and second respondents (collectively referred to in this judgment as the 'respondents') for, among others, the following relief:

(1) a declaration that the agreement had been extended to 30 September 2027; F

(2) a declaration that any contract purportedly awarded by the respondents to a third party regarding the car park services, is null and void;

(3) an injunction to compel the respondents to take all necessary action to ensure that the appellant is the exclusive operator of the car park services; G

(4) an injunction to restrain the respondents from performing any of the terms and conditions of any contract entered into with any third party, including but not limited to NESS, in relation to the car park services; H

(5) general damages or loss of profits suffered by the appellant; and

(6) exemplary damages,
('this suit'). I

[16] The appellant applied to the High Court for an ex parte interlocutory injunction, initially to restrain the first respondent and subsequently to restrain both the respondents, pending the disposal of this suit, from performing any of the terms and conditions of any contract entered into with any third party,

A including but not limited to NESS, in relation to the car park services.

[17] The learned judicial commissioner (as he then was) granted an ex parte interlocutory injunction to restrain the respondents, pending the disposal of this suit, from performing any of the terms and conditions of any contract entered into with any third party, including but not limited to NESS, in relation to the car park services ('ex parte interlocutory injunction').

[18] On 25 March 2025, the High Court:

(1) dismissed appellant's interlocutory injunction application with costs;

(2) allowed with costs an application by the first respondent to set aside the ex parte interlocutory injunction;

(3) allowed with costs the second respondent's application to set aside the ex parte interlocutory injunction; and

(4) allowed the first respondent's application to strike out this suit with costs, ('High Court's decision').

[19] The appellant filed an appeal to the Court of Appeal against the High Court's decision ('this appeal').

[20] The appellant applied to the High Court for an Erinford injunction to restrain the respondents from:

(1) performing any of the terms and conditions of any contract entered into with any third party, including but not limited to NESS, in relation to the car park services; and

(2) evicting the appellant from the building,

('appellant's Erinford injunction application (High Court)').

[21] On 15 April 2025, the High Court dismissed the appellant's Erinford injunction application (High Court) with costs and ordered the appellant to leave the building on 29 April 2025 ('High Court's eviction order').

D. PROCEEDINGS IN THE COURT OF APPEAL

[22] On 23 April 2025:

(1) in court encl No 3, the appellant filed an ex parte Erinford injunction application in the Court of Appeal ('appellant's first ex parte Erinford injunction application (Court of Appeal)'); and

(2) the appellant's solicitors sent a letter to the learned PCA and applied for an early hearing date of the appellant's first Erinford injunction

application (Court of Appeal) ('appellant's letter (PCA)'). As a consequence of the appellant's letter (PCA), the learned PCA directed me to hear the appellant's first Erinford injunction application (Court of Appeal).

[23] Inexplicably, on 24 April 2025, in court encl No 7 (encl 7), the appellant filed a second ex parte Erinford injunction application in the Court of Appeal (appellant's second ex parte Erinford injunction application (Court of Appeal)).

[24] In view of the High Court's eviction order (the appellant was to be evicted from the building on 29 April 2025), I directed my learned senior assistant registrar ('SAR') to fix a virtual hearing of both the appellant's first and second ex parte Erinford injunction applications (Court of Appeal) at the earliest date in my court schedule, ie, at 9am, 28 April 2025.

[25] At 9am, 28 April 2025, during the virtual hearing of the appellant's first and second ex parte Erinford injunction application (Court of Appeal), I asked the appellant's learned counsel on whether the appellant could file and proceed simultaneously with the appellant's first and second ex parte Erinford injunction application (Court of Appeal). The appellant's learned counsel then replied that he would withdraw the appellant's first ex parte Erinford injunction application (Court of Appeal) and proceed only with the second ex parte Erinford injunction application (Court of Appeal).

E. THE THREE OPTIONS AVAILABLE TO THE COURT OF APPEAL IN AN EX PARTE NOTICE OF MOTION (EX PARTE APPLICATION)

[26] Rules 22, 27(1), (3), 49 and 50 of the Rules of the Court of Appeal 1994 ('the RCA') provide as follows:

> r 22 *Urgent appeals*.
>
> *Any party filing a notice of appeal may in the case of urgency apply in writing to the President who, if satisfied that it is a proper case for an urgent hearing, may order the appeal to be heard at such time convenient to the Court*. On such order the party applying shall file copies of the papers lodged in the High Court and his grounds of appeal.
>
> r 27 *Applications to Court*.
>
> (1) *All applications to the Court shall unless otherwise provided be made by motion and shall be heard in open court.*
>
> ...
>
> (3) *Notice of motion shall be served on the parties concerned not less than seven days before the return day, unless the Court otherwise orders. Applications for leave to give*

shorter notice may be made by motion ex parte.

r 49 *Where notice of motion to be given.*

Except where by any order or rule, it may be made ex parte in the first instance, no motion shall be made without previous notice to the parties affected thereby. But the Court or a Judge may make any order ex parte upon such terms as to costs or otherwise, and subject to such undertaking, if any, as the Court or Judge may think just; and any party affected by such order may move to set it aside.

r 50 *Motions may be dismissed or adjourned where necessary notice not given.*

If on the hearing of a motion or other application the Court shall be of opinion that any person to whom notice has not been given ought to have or to have had such notice, the Court may either dismiss the motion or application, or adjourn the hearing thereof, in order that such notice may be given, upon such terms, if any, as the Court may think fit to impose. (Emphasis added.)

[27] Firstly, according to r 27(3) of the RCA, an ex parte application may be made to the Court of Appeal. Furthermore, the Court of Appeal has a discretion to grant an ex parte order under r 49 of the RCA.

[28] In an ex parte application, the Court of Appeal has a discretion to adopt any one of the following three options (three options):

(1) the Court of Appeal may proceed to hear the ex parte application ('first option');

(2) the Court of Appeal may direct the ex parte application to be heard as an 'opposed ex parte application' ('second option'). The exercise of the second option is illustrated in the following judgment of Hasnah Hashim JCA (as she then was) in the Court of Appeal case of *Mukhriz Mahathir v Datuk Seri Mohd Najib bin Tun Hj Abdul Razak (suggested contemnor) & Anor* [2018] 3 MLJ 715, at [9(a)], [18] and [24]:

[9] *The determinative issues in this appeal are as follows:*

(a) *whether the learned judge erred when he heard the matter as opposed ex parte;*

...

[18] In order for the court to be able to make a fair and just decision all the relevant facts must be before it. In an ex parte application, there must be full and frank disclosure of material facts by the applicant. The applicant must only make submissions in support of the application and also highlight potential arguments against the grant of the application, including the facts that are likely to be raised by the proposed alleged contemnor in objecting to the application if it were an inter parte application. *Whilst O 52 r 3 of the ROC provides that an application must be made ex parte the court nevertheless still retains the discretion to order that the matter be heard inter partes with the necessary directions if the circumstances so*

warrant and this discretion must no doubt be exercised judiciously.

...

[24] *Hence, the learned High Court judge cannot be faulted for ordering that the matter be heard as opposed ex parte. Based on the above cited authorities the approach taken by the High Court judge is not without precedent. Therefore, on the first issue we find no error on the part of the High Court judge in deciding to hear the matter as an opposed ex parte.* (Emphasis added.)

When the Court of Appeal exercises its discretion to hear an ex parte application on an 'opposed ex parte' basis:

(a) learned counsel for the respondent or putative respondent (X) is invited by the Court of Appeal to be present and to assist the Court of Appeal on issues of law and/or fact with regard to theex parte application as the Court of Appeal considers just and appropriate ('court's invitation'). Needless to say, it is entirely up to X to attend the hearing of theex parte application ('hearing (ex parte application)'). No adverse inference can be drawn against the respondent or putative respondent if X does not accept the court's invitation.
Notwithstanding the fact that there is no court's invitation, there may be two instances where X may be present at the hearing (ex parte application), namely:

(i) X is expressly informed by the applicant's solicitors of the hearing (ex parte application); or

(ii) for whatever reason, X happens to know of the hearing (ex parte application) and consequently, X attends the hearing (ex parte application),
('two instances (opposed ex parte)').
In the two instances (opposed ex parte), the Court of Appeal still has a discretion to proceed with the first option. In such an event, X must leave the hearing (ex parte application).

(b) the respondent or putative respondent is not entitled to file any affidavit to oppose the ex parte application; and

(c) if X is present and has submitted at the ex parte application:

(i) any order made by the Court of Appeal at the ex parte application is still an ex parte order; and

(ii) the respondent or putative respondent is entitled to apply subsequently to the Court of Appeal pursuant to r 49 of the RCA to set aside the ex parte order; or

(3) by virtue of r 50 of the RCA, the Court of Appeal may direct the ex parte

application to be heard as an inter partes application ('third option').

[29] Generally, I am in favour of the third option due to the following reasons:

(1) an ex parte application should only be filed in the Court of Appeal 'where it is genuinely impossible to give notice without defeating the purpose of the order' to be sought from the Court of Appeal — please refer to the judgment of Edgar Jospeh Jr J (as he then was) in the High Court case of *Pacific Centre Sdn Bhd v United Engineers (M) Bhd* [1984] 2 MLJ 143, at p 146.

In the High Court, understandably, an application for the following three orders (Mareva/Anton Piller order/delivery order) has to be made on an ex parte basis:

(a) a Mareva injunction;

(b) an Anton Piller order; and/or

(c) an order to deliver electronic devices, including mobile phones, laptop, notebook, iPad, digital and optical storage devices. In *Juris Technologies Sdn Bhd & Anor v Foo Tiang Sin & Ors* [2019] 12 MLJ 785, at [1], [3] and [28(a)], the High Court had granted an ex parte delivery order of certain electronic devices.

It defeats the purpose of the applications in the High Court for a Mareva/Anton Piller order/delivery order for such applications to be made on an inter partes basis. Having said that, at the Court of Appeal, it is difficult to find any reason, let alone justification, for an ex parte notice of motion for a Mareva/Anton Piller order/delivery order. This is because an application for Mareva/Anton Piller order/delivery order would and should have been made in the High Court on an ex parte basis.

An application for leave of the Court of Appeal to commence committal proceedings may be applied on an ex parte basis. Once again, in such case, the Court of Appeal has three options;

(2) the following cases have decided that the third option should be the rule and not the exception:

(a) in *Permodalan MBF Sdn Bhd v Tan Sri Datuk Seri Hamzah bin Abu Samah & Ors* [1988] 1 MLJ 178:

(i) the respondents obtained from one High Court judge an ex parte

mandatory and restraining interlocutory injunction against the appellants;

(ii) the respondents obtained from another High Court judge an ex parte suspension of certain paragraphs of the ex parte interlocutory injunction ('ex parte suspension order'); and

(iii) on appeal, the Supreme Court set aside the ex parte suspension order.

Syed Agil Barakbah SCJ delivered the following judgment of the Supreme Court in *Permodalan MBF*, at p 180:

> *Inter-party hearing appears to be the rule while an ex parte application for injunction appears to be the exception in the circumstances provided by [the then O 29 r 1(2) and (3) of the Rules of the High Court 1980] and is to be allowed only in cases of urgency on the application of the plaintiff.* (Emphasis added.)

The sole issue in *Permodalan MBF* was whether the second High Court judge could lawfully suspend the ex parte interlocutory injunction on an ex parte basis. Hence, in my respectful view, the above dictum (ex parte applications can only be allowed in urgent cases) is merely obiter.

If there is an urgent need for the Court of Appeal to hear an appeal, the solicitor in question, should apply to the learned PCA under r 22 of the RCA for the learned PCA to order an early hearing date of the appeal. If there is an urgent need for the Court of Appeal to hear an application, the advocate and solicitor in question, should certify the existence of such an urgency in a 'certificate of urgency' and if the Court of Appeal is satisfied that there is an urgent need to hear the application, the Court of Appeal may fix an early hearing date of the application. In this regard, it is decided by the High Court in *Chin Wai Hong & Anor v Lim Guan Hoe & Anor* [2014] MLJU 1948; [2014] 5 AMR 427, at [40(b)] and [40(c)], as follows:

> [40] *In summary, I express the following view in Sigma Elevator (M) Sdn Bhd (M) Sdn Bhd v Bahagia Indah Properties Sdn Bhd* [2014] AMEJ 872:
>
> ...
>
> (b) *despite the urgent nature of the interlocutory injunction application in question, ex parte interlocutory injunction applications should only be made when 'it is genuinely impossible to give notice without defeating the purpose of the order' (please see Pacific Centre Sdn Bhd v United Engineers (M) Bhd* [1984] 2 MLJ 143, di p 146). *Applications for Anton Piller and Mareva orders, by their very nature, have to be made ex parte. After my decision in Sigma Elevator (M) Sdn Bhd, my research reveals that the Privy Council's opinion (on an appeal from Jamaica) in National Commercial Bank Jamaica Ltd, at p 1408 (para 13), supports the requirement to give notice of an interlocutory injunction application, no matter how urgent, to the defendant —*

A *... there appears to have been no reason why the application for an injunction should have been made ex parte, or at any rate, without some notice to the bank. Although the matter is in the end one for the discretion of the judge, audi alteram partem is a salutary and important principle. Their Lordships therefore consider that a judge should not entertain an application for which*
B *no notice has been given unless either giving notice would enable the defendant to take steps to defeat the purpose of the injunction (as in the case of a Mareva or Anton Piller order) or there has been literally no time to give notice before the injunction is required to prevent the threatened wrongful act. ... Their Lordships would expect cases in the latter category to be rare, because even in*
C *cases in which there was no time to give the period of notice required by the rules, there will usually be no reason why the applicant should not have given shorter notice or even made a telephone call. Any notice is better than none*. (Emphasis added.);

D (c) *if the purpose of an interlocutory order will not be defeated if an inter partes application is made (as held in Pacific Center Sdn Bhd), that application should be not be made ex parte even though there are 'urgent' and compelling circumstances because —*

(i) *the plaintiff may apply to court under O 3 r 5(1) of the RC [Rules of Court 2012] to abridge time for short service of the application in question on the*
E *defendant; ... (Emphasis added.)*

(b) Mahadev Shankar J (as he then was) decided as follows in the High Court case of *Million Group Credit Sdn Bhd v Lee Shoo Khoon & Ors* [1986] 1 MLJ 315, at p 317:

F *... in these modern days of swift communication, ex parte applications should be the exception rather than the rule.* (Emphasis added.)

(3) if the Court of Appeal exercises the first or second option, the respondent or
G putative respondent is nevertheless entitled to:

(a) oppose the inter partes application; and/or

(b) apply to set aside any ex parte order.

H If the Court of Appeal exercises the third option, the following advantages may ensue:

(i) the ex parte application need not be heard and there is therefore an optimal use of the limited resources of the Court of Appeal; and

I (ii) parties can minimise their time, effort and costs.

(4) the Court of Appeal's exercise of the third option, may prevent an abuse of the ex parte application, especially when an ex parte interlocutory mandatory injunction is sought for — please refer to *Chin Wai Hong*, at [23(c)].

[30] Needless to say, there may be exceptions to my general view as expressed in the above para 29.

F. WHY THE THIRD OPTION WAS CHOSEN IN THE APPELLANT'S SECOND EX PARTE ERINFORD INJUNCTION APPLICATION (COURT OF APPEAL)?

[31] At about 9.15am, 28 April 2025, after the appellant's learned counsel informed the court that the appellant would be withdrawing the appellant's first ex parte Erinford injunction application (Court of Appeal) and would only proceed with the second ex parte Erinford injunction application (Court of Appeal), I informed the appellant's learned counsel that I had decided to exercise the third option pursuant to r 50 of the RCA, namely, to hear the appellant's second ex parte Erinford injunction application (Court of Appeal) on an inter partes basis. My reasons are as follows:

(1) an Erinford injunction application is made on an inter partes basis in the High Court after the High Court has dismissed an inter partes interlocutory injunction application ('High Court's dismissal (interlocutory injunction application)'). There is no basis for an ex parte Erinford injunction application to be made to the High Court because the purpose of an Erinford injunction application in the High Court is not defeated if such application is made on an inter partes basis — please refer to the above sub-para 29(1).

Upon the High Court's dismissal of an inter partes Erinford injunction application (High Court's dismissal (Erinford injunction application)), by virtue of s 43 of the CJA, an Erinford injunction application can be made to the Court of Appeal (Erinford injunction application (Court of Appeal)). Reproduced below is s 43 of the CJA:

> 43 *Applications.*
>
> *Wherever application may be made either to the High Court or to the Court of Appeal, it shall be made in the first instance to the High Court.* (Emphasis added.)

As explained in the above sub-para 29(1), an Erinford injunction application (Court of Appeal) should be made on an inter partes basis because the purpose of the Erinford injunction application (Court of Appeal) is not defeated if an inter partes Erinford injunction application (Court of Appeal) is filed;

(2) after:

(a) the High Court's dismissal (interlocutory injunction application); and

(b) the High Court's dismissal (Erinford injunction application),

– the party who is the subject matter of the interlocutory

injunction application ('Y') is entitled to conduct Y's business and/or affairs ('Y's business/affairs') based on the High Court's dismissal (interlocutory injunction application) and High Court's dismissal (Erinford injunction application). If an ex parte Erinford injunction application (Court of Appeal) is made and an ex parte Erinford injunction is subsequently granted by the Court of Appeal ('ex parte Erinford injunction (Court of Appeal)'), Y may not only be surprised but may also be prejudiced because Y's business/affairs may be adversely affected by the ex parte Erinford injunction (Court of Appeal).

(3) the cases and reasons which support the third option as expressed in the above sub-paras 29(2)–(4).

[32] As the High Court's eviction order would take effect on the very next day, ie, 29 April 2025, I exercised the third option pursuant to r 50 of the RCA with the following order and direction:

(1) the inter partes hearing of encl 7 was fixed at 2pm, 28 April 2025 (the same day) and would be heard virtually ('inter partes hearing (encl 7)'). My learned SAR had provided the Zoom link for the inter partes hearing (encl 7) ('Zoom link');

(2) the appellant's solicitors were directed to serve the appellant's letter (PCA), encl 7 and all cause papers on the solicitors of both the respondents by way of email. According to r 27(3) of the RCA, generally, there should be 'not less than seven days before' the hearing date of a notice of motion filed in the Court of Appeal ('seven-day service period'). Exceptionally, r 27(3) of the RCA (unless the court otherwise orders) confers a discretion on the Court of Appeal to abridge the seven-day service period. In view of the exigency of this case, namely, the effect of the High Court's eviction order, I exercised my discretion pursuant to r 27(3) of the RCA and abridge the seven-day service period with regard to the inter partes hearing (encl 7) (court's abridgement order);

(3) I directed the appellant's solicitors to inform by way of email on an urgent basis the solicitors of both the respondents as follows:

(a) the court had ordered the appellant's second ex parte Erinford injunction application (Court of Appeal) to be heard virtually at 2pm, 28 April 2025, on an inter partes basis;

(b) the Zoom link must be provided to the solicitors for both the respondents;

(c) the appellant's letter (PCA), encl 7 and all relevant cause papers

must be served by way of email on the respondents' solicitors;

(d) the abridgement order had been made; and

(e) if learned counsel for both the respondents do not attend the virtual hearing of the inter partes hearing (encl 7), the court would proceed to make any order as the court considers just and appropriate.

(4) after the matters directed in the above sub-paras (2) and (3) had been performed by the appellant's solicitors, one of the appellant's solicitors was directed to affirm an affidavit of service regarding those matters.

G. THE BASIS FOR THE COURT OF APPEAL TO GRANT AN ERINFORD INJUNCTION PENDING THE DISPOSAL OF AN APPEAL

[33] Reproduced below are:

(1) ss 38(1), 44 and 73 of the CJA; and

(2) r 13 of the RCA:

> CJA
>
> s 38 *Composition of the Court of Appeal*.
>
> (1) Subject as hereinafter provided, every proceeding in the Court of Appeal shall be heard and disposed of by three Judges or such greater uneven number of Judges as the President may in any particular case determine.
>
> s 44 *Incidental directions and interim orders*.
>
> (1) In any proceeding pending before the Court of Appeal any direction incidental thereto not involving the decision of the proceeding, any interim order to prevent prejudice to the claims of parties pending the hearing of the proceeding, any order for security for costs, and for the dismissal of a proceeding for default in furnishing security so ordered may at any time be made by a Judge of the Court of Appeal.
>
> (2) Every application under subsection (1) shall be deemed to be a proceeding in the Court of Appeal.
>
> (3) *Every order made under subsection (1) may, upon application by the aggrieved party made within ten days after the order is served, be affirmed, varied or discharged by the Court.*
>
> s 73 *Appeal not to operate as stay of execution*.
>
> *An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from unless the court below or the Court of Appeal so orders* and no intermediate act or proceeding shall be invalidated except so far as the Court of Appeal may direct.

RCA

r 13 Stay of proceedings on appeal

An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from unless the High Court or the Court so orders and no intermediate act or proceeding shall be invalidated except so far as the Court may direct. (Emphasis added.)

[34] The learned PCA may direct a notice of motion to be heard by:

(1) a single judge under s 44(1) of the CJA ('single judge panel'); or

(2) a three-member panel pursuant to s 38(1) of the CJA ('three-judge panel').

[35] There is a distinction between the powers and orders which can be made by a single judge panel and three-judge panel. I will refer to my supporting judgment in the Court of Appeal case of *Aspen Glove Sdn Bhd v Tialoc Malaysia Sdn Bhd* [2024] 4 MLJ 825, at [104], as follows:

[104] *With respect, I am of the following view regarding the effect of ss 38(1), 44 and 73 of the CJA*:

(1) *by reason of s 38(1) of the CJA, generally, every proceeding in the Court of Appeal shall be heard and disposed of by three judges of the Court of Appeal (Court of Appeal (three JJCA)). As such, the term 'Court of Appeal' in s 73 of the CJA must refer to the Court of Appeal (three JJCA) and not one JCA*;

(2) *it is clear from the words in s 73 of the CJA (an appeal shall not operate as a stay of execution or of proceedings under the decision appealed from unless the court below or the Court of Appeal so orders) and r 13 of the RCA (an appeal shall not operate as a stay of execution or of proceedings under the decision appealed from unless the High Court or the court (Court of Appeal (three JJCA)) so orders) that*:

(a) *as a general rule, the High Court and the Court of Appeal (three JJCA) should not grant a stay order (pending appeal) (general rule) — please refer to Universal Trustee (M) Bhd v Lambang Pertama Sdn Bhd & Anor[2015] 7 MLJ 307, at [14]–[15]; and*

(b) *as an exception to the general rule, the High Court and the Court of Appeal (three JJCA) can only grant a stay order (pending appeal) if the special circumstances test is fulfilled — please refer to Kosma Palm Oil Mill;*

(3) *s 44(1) of the CJA empowers one JCA (not the Court of Appeal (three JJCA)) to:*

(a) *give any 'direction' incidental thereto not involving the decision of the 'proceeding' of the Court of Appeal (three JJCA). Section 3 of the CJA has defined 'proceeding' to mean 'any proceeding whatsoever of a civil or criminal nature and includes an application at any stage of a proceeding'*;

(b) *make 'any interim order to prevent prejudice to the claims of parties pending the hearing of the proceeding' in the Court of Appeal (three JJCA) (interim*

order (s 44(1) of the CJA)). I shall describe the test stipulated in s 44(1) of the CJA as the 'prevention of prejudice test'. It is to be emphasised that the prevention of prejudice test is easier to satisfy than the special circumstances test; and

(c) order security for costs (SFC) for a proceeding in the Court of Appeal (three JJCA) and to dismiss the proceeding if SFC is not furnished for that proceeding.

In view of the words 'subject as hereinafter provided' in s 38(1) of the CJA, it is clear that s 44(1) of the CJA is an exception to s 38(1) of the CJA. This is understandable as generally, proceedings in the Court of Appeal are decided by three JJCA;

(4) *according to s 44(3) of the CJA , upon an application by a party aggrieved by an interim order (s 44(1) of the CJA) made by one JCA, the interim order (s 44(1) of the CJA) may be 'affirmed, varied or discharged by the court'. By virtue of s 38(1) of the CJA , the term 'court' in s 44(3) of the CJA can only mean the Court of Appeal (three JJCA). Accordingly, by virtue of s 44(3) of the CJA , the Court of Appeal (three JJCA) can affirm, vary or discharge an interim order (s 44(1) of the CJA) made by one JCA;*

(5) *to prevent prejudice to the claims of parties pending the disposal of a notice of motion, one JCA can make a stay order (pending notice of motion) pursuant to s 44(1) of the CJA. Upon an application by any party aggrieved by the stay order (pending notice of motion) (s 44(3) of the CJA Application), the Court of Appeal (three JJCA) can then affirm, vary or discharge the stay order (pending notice of motion) under s 44(3) of the CJA;*

(6) *neither one JCA nor the Court of Appeal (three JJCA) can make a stay order (pending appeal) pursuant to s 44(1) of the CJA. This view is supported by the following reasons:*

(a) *s 73 CJA has specifically provided for the discretionary power of the Court of Appeal (three JJCA) to grant a stay order (pending appeal). Furthermore, s 73 of the CJA is placed in Part III CJA under the heading of 'Appellate Jurisdiction — Civil Appeals'.*

Section 44(1) of the CJA *is placed in Part III of the CJA under the heading 'general'. It is clear that in comparison to the specific provision in s 73 of the CJA, s 44 of the CJA is a general provision. In accordance with the canon of construction generalia specialibus non derogant, the specific provision of s 73 of the CJA (not the general provision of s 44(1) of the CJA) should apply in a stay application (pending appeal).*

In the Court of Appeal case of Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor [1995] 1 MLJ 719, *at 758 to 759, Gopal Sri Ram JCA has applied the maxim generalia specialibus non derogant to give effect to a specific provision of the National Land Code ('the NLC') in preference to a general provision in the NLC;*

(b) *if one JCA and the Court of Appeal (three JJCA) has the discretionary power to grant a stay order (pending appeal) pursuant to s 44(1) of the CJA*:

(i) *this will create an absurdity because any party aggrieved by the stay order (pending appeal) made under s 44(1) of the CJA , may subsequently file a s 44(3) of the CJA application to the Court of Appeal*

(three JJCA) to vary or discharge the stay order (pending appeal)! In such an event, there will be a duplicity in form of the stay application (pending appeal) and s 44(3) of the CJA application; and

(ii) *s 44(1) of the CJA provides for the prevention of prejudice test which is a less onerous test vis a vis the special circumstances test. This will then undermine the general rule — please refer to the High Court's judgment in Maziah bt Musa v Zainulabidin bin Mat Akhir, Dato' & Ors* [2014] MLJU 1828; [2014] 5 AMR 793*, at [28(f)]; and*

(c) *the following judgment of Mohd. Hishamudin JCA in the Court of Appeal case of Tamabina Sdn Bhd & Anor v Nakamichi Corp Bhd* [2014] 4 MLJ 613*, at [16], supports the above view —*

[16] In our judgment it is crystal clear in the present case that the application is in the nature of a stay of execution. Mr Gideon Tan does not appear to dispute this fact. And this being the case, the application then ought to have been made pursuant to s 73 of the [CJA] , read with s 43 of the [CJA]. The application should not have been made pursuant to s 44 of the [CJA]. To having made the application purportedly pursuant to s 44 of the [CJA] is an abuse of that section.

... (Emphasis added.)

[36] I am of the following view regarding a single judge panel's discretionary power to grant an Erinford injunction pending the disposal of an appeal by the Court of Appeal ('interim Erinford injunction (pending appeal)'):

(1) when a High Court dismisses an application for an injunction, final and interlocutory ('High Court's dismissal (injunction application)'), an interim Erinford injunction (pending appeal):

(a) only restrains the successful party in the High Court's dismissal (injunction application) from taking any step or action pending the disposal of an appeal to the Court of Appeal;

(b) cannot stay the execution of the High Court's dismissal (injunction application); and

(c) does not stay the proceedings in the High Court.
Consequently, s 73 of the CJA and r 13 of the RCA regarding the Court of Appeal's power to:

(i) stay the execution of a judgment and order of the High Court; and

(ii) stay the proceedings in the High Court,
– based on the 'special circumstances' test (please refer to please refer to *Aspen Glove*), do not apply to an interim Erinford injunction (pending appeal).

(2) by virtue of s 44(1) of the CJA, a single judge panel may grant an

Erinford injunction pending the disposal of an appeal as an 'interim order to prevent prejudice to the claims of parties pending the hearing of the proceeding' (interim Erinford injunction (single judge panel)); and

(3) any party who is 'aggrieved' by the interim Erinford injunction (single judge panel), may apply to a three-judge panel under s 44(3) of the CJA for the interim Erinford injunction (single judge panel) to be 'affirmed, varied or discharged' — please refer to *Aspen Glove*, at (104(4) and (5)).

H. SHOULD AN INTERIM ERINFORD INJUNCTION (SINGLE JUDGE PANEL) BE GRANTED IN ENCL 7?

[37] At about 2pm, 28 April 2025, at the virtual hearing of the inter partes hearing (encl 7):

(1) all the learned counsel for the appellant and respondents were present virtually;

(2) I informed learned counsel for the respondents what had transpired earlier (at about 9am, 28 April 2025) during the virtual and ex parte hearing of encl 7;

(3) I asked all learned counsel for the respondents on whether they had received by way of email, a copy of the appellant's letter (PCA), encl 7 and all relevant cause papers. Both learned counsel for the respondents answered in the affirmative; and

(4) I explained to all learned counsel that due to the High Court's eviction order, there was an urgent need to hear encl expeditiously. Hence, the virtual hearing of the inter partes hearing (encl 7).

[38] I asked learned counsel for both the respondents on whether they had any objection to encl 7. The second respondent's learned counsel objected orally to encl 7 on the following grounds, among others:

(1) the monetary remedy of damages was an adequate remedy for the appellant. As such, encl 7 should be dismissed on this ground alone; and

(2) the appellant had not paid what was due and payable to the second respondent under the agreement.

[39] After hearing the oral submission of the second respondent's learned counsel, I exercised my discretion pursuant to s 44(1) of the CJA to grant an interim Erinford injunction (single judge panel) against the second respondent only (pending the disposal of this appeal) based on the following two conditions:

(1) the appellant shall furnish an undertaking to pay damages to the second

respondent (appellant's undertaking):

(a) if the interim Erinford injunction (single judge panel) is subsequently set aside by a three-judge panel under s 44(3) of the CJA; or

(b) if the interim Erinford injunction (single judge panel) is affirmed later by a three-judge panel, this appeal is subsequently dismissed by a three-judge panel; and

(2) the appellant's undertaking shall be fortified by the appellant's deposit of RM200,000 (the sum of money due and payable by the appellant to the second respondent under the agreement) in an interest-bearing 'client account' (as understood in r 2 of the Solicitors' Account Rules 1990) in the sole name of the solicitors for the second respondent on or before 5pm, Monday, 5 May 2025 and the second respondent's solicitors shall hold the sum as stakeholders until the disposal of this appeal or further order of the Court of Appeal,
('conditional interim Erinford injunction (single judge panel)').

I had also ordered costs of encl 7 to follow the event of this appeal.

[40] The reasons for the grant of the conditional interim Erinford injunction (single judge panel) were as follows:

(1) in view of the imminent effect of the High Court's eviction order on the very next day, ie, 29 April 2025, there was simply no time for the respondents to file any affidavit to oppose encl 7, let alone file any written submission to oppose the same;

(2) the conditional interim Erinford injunction (single judge panel) may be set aside, wholly or in part, by a three-judge panel pursuant to s 44(3) of the CJA. There is therefore an expeditious remedy available to the second respondent as provided in s 44(3) of the CJA;

(3) if the second respondent suffers any loss and/or damage due to the conditional interim Erinford injunction (single judge panel) (second respondent's loss/damage), upon the occurrence of any one of the two events stated in the above sub-para 39(1)(a) or (b), the second respondent may enforce the appellant's undertaking and apply to the Court of Appeal for an order of assessment of the second respondent's loss/damage to be conducted by the High Court; and

(4) I had orally informed all learned counsel on 28 April 2025 that:

(a) as there was no sufficient time for the court to direct an exchange of affidavits with regard to encl 7, the respondents were not deemed to have admitted any one of the factual averments in the

appellants' affidavit in support of encl 7; and

(b) I had not decided on the merits of encl 7. All the parties in this case are at liberty to submit as they see fit in any application to set aside the conditional interim Erinford injunction (single judge panel) pursuant to s 44(3) of the CJA. In other words, the conditional interim Erinford injunction (single judge panel) cannot trigger an application of the issue estoppel principle against the respondents in this appeal.

Order accordingly.

Reported by Dzulqarnain Ab Fatar